United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

343

BRIEF FOR APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23264

N. SIDNEY NYHUS, *Appellant*

v.

TRAVEL MANAGEMENT CORPORATION, *Appellee*

On Appeal from the United States District Court for the District of Columbia

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TABLE OF CONTENTS

CITATIONS

CASES:

* Cases or authorities chiefly relied upon are marked by asterisks.

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BRIEF FOR APPELLANT

STATEMENT OF ISSUES

I. Whether the District Court erred in granting defendant's motion for summary judgment on the ground that under District of Columbia law the Statute of Limitations begins to run immediately upon the execution of a contract, regardless of the fact that the parties may have agreed that demand for performance is a precondition to the accrual of a right of action on their contract.

II. Is summary judgment dismissing a contract suit on the basis that the contract is illegal and unenforceable and lacks consideration appropriate where:

(a) Defenses of illegality, unenforceability and lack of consideration were never pleaded;

(b) The defenses were not raised by defendant in its motion for summary judgment;

(c) Plaintiff had not been afforded an opportunity to make discovery with respect thereto;

(d) The defenses were raised *sua sponte* by the court; and

(e) The court did not apprise counsel in advance of argument or ruling that it intended to consider these defenses and did not permit counsel to prepare and submit opposing briefing materials?

If not, did the court nevertheless err in ruling on summary judgment that this particular agreement was illegal and lacked consideration and hence was unenforceable?

The pending case has not previously been before this Court.

REFERENCES TO RULINGS

The formal ruling issued by the court below is contained in its Order, dated May 27, 1969, granting defendant's motion for summary judgment and dismissing the complaint with prejudice; the Order is reprinted in the Record Appendix. An opinion or memorandum has not been issued by the court. It did, however, briefly state its reasons for the decision at argument on defendant's summary judgment motion (Transcript, hereinafter "Tr.").

STATEMENT OF THE CASE

I. Nature of the Case and Disposition Below

Plaintiff, N. Sidney Nyhus, appeals from a summary judgment order entered against him in the District Court (Gesell, J.) in Civil Action Number 234-69, dismissing his

damage suit for wrongful refusal to deliver corporation stock under an employment agreement. Travel Management Corporation (TMC), Nyhus' former employer and defendant in this action moved for summary judgment solely on the ground that the claim was precluded by the three-year Statute of Limitations (D.C. Code § 12-301(7)). For purpose of its motion TMC admitted the critical facts of the complaint: (1) that the stock in question was due and owing in May, 1964 when the employment agreement was terminated by mutual consent; (2) that TMC had agreed to deliver the stock at some unspecified future date, when called for by Nyhus; and (3) that demand therefor was first made in January, 1968 (Defendant's Statement Under Local Rule 9(h)). Consequently, the only issue briefed to the court was whether the action accrued in May, 1964 or at the later date, January, 1968, when demand was made in fact.

We maintained throughout and still believe that the record demonstrated (1) the existence of a mutual understanding between the parties that Nyhus would call for the stock at some indefinite future date and (2) an assumption by the parties that a demand was prerequisite to a right of action. TMC argued that "no such oral understanding could extend the Statute of Limitations" (Memorandum in Support of Defendant's Motion for Summary Judgment, p. 2) and that the action automatically and inescapably accrued in May, 1964. Based upon the proposition that a right of action in contract comes into being at the time of breach or failure to do the thing agreed to, but not until then, we reasoned that the latter date controlled. Part of our argument consisted of an analogy to the bailment cases for wrongful refusal to deliver; for the rest we relied upon two cases of this Court.

Issue having been joined and briefed the cause proceeded to oral argument. There, for the first time, and on its own initiative, the court asserted that this arrangement was a deal between Nyhus and "his friend" to dodge

taxes and that therefore it lacked consideration (Tr. at pp. 5-6). Quite candidly, in view of that colloquy and the subsequent Order dismissing the complaint, we have not really been able to ascertain precisely the basis on which this suit was disposed of by the court below. There was no opinion; the reason or reasons for dismissal were not stated in the Order; and the transcript of the oral argument reveals only that new matters, not pleaded or briefed, were considered in granting TMC's motion.

II. Facts Relevant to the Issues Presented

The facts relevant to the Statute of Limitations issue (and for that matter any other issue) will be found for the most part in the complaint (and attached employment agreement), the Nyhus deposition and Defendant's Statement Under Local Rule 9(h), in which TMC acknowledges for our purposes the complaint facts. These facts and averments we presume served as the basis for the court's determination below that plaintiff could not prevail under any circumstances. TMC offered no rebuttal facts by way of testimony, affidavits, depositions or the like and its position consisted entirely of a brief legal argument. These unchallenged facts are set out below.

A. The Employment Agreement and Experience Thereunder

In August 1962 Nyhus signed a five-year employment agreement with TMC to serve in an executive capacity. A clause in the contract relating to remuneration for these services provided in pertinent part that he could elect to receive a portion of his compensation in TMC common stock (Employment Agreement, para. 4). Inasmuch as the stock had not been registered with the Securities and Exchange Commission under the Securities Act of 1933, 15 U.S.C. §§ 77a *et seq.*, Nyhus' rights to any stock received under this election were subject to significant restrictions. Any share certificates received were to bear a restrictive legend prohibiting sale until Nyhus could supply "an

opinion of counsel" satisfactory to TMC that in order to be sold it was not necessary that the stock be registered. In the likely event that there was no market value for the stock the parties agreed that two dollars per share would be used in computing Nyhus' entitlement (Employment Agreement, para. 5).

Services were rendered by Nyhus for the period at issue (December, 1963-May, 1964) and pursuant to the agreement he chose to receive 3,125 shares of TMC stock. Because of his overall financial situation, however, Nyhus was unable then to meet what he conceived to be the possible tax obligations on unregistered and restricted stock that he could not market (Nyhus dep. at p. 7). Accordingly, sometime in May, 1964[1] he proposed to Mr. Edward Kingman, then TMC treasurer,[2] that the share certificates not be issued to him at that time. Instead he requested that a notation of TMC's obligation to furnish him these shares on request be made on TMC's corporate books but that delivery of the stock be deferred until he, Nyhus, would make a demand for its delivery, when his financial pressures sufficiently eased. Kingman agreed and conceded that this was a "common sense approach" to the problem; he also stated he would take the necessary and appropriate steps (Nyhus dep. at pp. 7-10). Manifestly, each understood and expected that delivery would not be made until some indefinite future date, possibly six months, three years or even longer (Nyhus dep. at pp. 15-16, 46-47).

Although both men were accountants, so far as the record shows, neither had been or was then a practicing tax lawyer; indeed there was no testimony even as to their tax

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1 Nyhus was unable to pinpoint exactly when during May he reached the agreement with TMC (Nyhus dep. at p. 8).

2 The court's reference to Mr. Kingman as a "friend" of Mr. Nyhus must have been based upon Nyhus' testimony that it was his recommendation that led to the hiring of Kingman by TMC's Board of Directors (Nyhus dep. at pp. 8, 44-45).

experience. On the subject of their intentions Nyhus testified as follows:

> "A. * * * There was no question to illegality or question of evasion of tax. It was just the inability to make a payment there, if the contract was lived up to at that time. So, I asked for a postponement of the fulfillment of the obligation, knowing that I was not liable for the tax until I received either the money or the constructive payment."
>
> "Q. And you and Mr. Kingman at that time thought, your understanding was, it was perfectly legitimate?"
>
> "A. Absolutely legitimate. I have no desire to mix with the IRS." (Nyhus dep. at pp. 45-46).

Neither Kingman nor anyone else has been called to testify or submit affidavits on behalf of TMC to show that these parties intended otherwise. The question of illegality had never been raised by anyone, including TMC and its auditors. In fact a letter of Mr. Ralph Wigger, TMC's assistant treasurer, dated March 17, 1965, acknowledged that "Arthur Andersen [TMC's auditors] asked him [Nyhus] to sign a waiver of rights to the stock, but at that time, he said he wanted it eventually. Therefore, AA & Co. accrued it as of 11/30/64 in the amount of $6,250.00."[3]

The employment agreement was terminated on May 31, 1964 by mutual consent. Nyhus first made demand on TMC for the stock on January 15, 1968 but until today TMC has refused delivery although never denying the existence of the obligation.

B. The District Court Action Instituted by Nyhus

On January 30, 1969, Nyhus filed an action for damages resulting from being deprived of an opportunity to sell the stock at the advantageous market prices prevailing

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[3] This letter is reprinted in full in the Appendix to this brief at page 19. Defendant acknowledges that this letter "appears to relate to some aspects of this matter" (Defendant's Answers to Interrogatories, p. 2).

since demand was made. TMC's answer to the complaint was by way of general denial and a defense that the action was barred by the Statute of Limitations. Neither illegality nor any other affirmative defense was pleaded. Discovery consisted of Nyhus' deposition and plaintiff's service of interrogatories seeking to elicit the bases for defendant's general denials. TMC for the first time alluded to the possibility that the understanding may have been "unauthorized, illegal and unenforceable" in responding to the interrogatories (Defendant's Answers to Interrogatories, p. 1). Shortly thereafter, on April 24, 1969, TMC moved for summary judgment. "The grounds (sic), . . . [was] that plaintiff's alleged claim is barred by the Statute of Limitations" (Defendant's Motion for Summary Judgment). Briefing followed exclusively on that issue.

At oral argument the court *sua sponte* raised the illegality defense, inquired briefly about it, characterized the arrangement as "a tax dodge in which your client . . . worked out a deal with his friend, who was on the defendant's side, in order to avoid his tax liability" (Tr. at p. 5) and granted summary judgment. Indicating his reasons from the bench the court said that unless there was a bailment we were out on the Statute and there was no bailment; he also found no new contract because there was no consideration "unless it be a mutual agreement to assist the plaintiff to avoid his tax obligations, and that is illegal consideration and such a contract would be unenforceable" (Tr. at pp. 2, 12). An opinion was not issued and the boilerplate-type Order provided only that upon consideration of the motion and papers and after oral argument defendant's motion was granted, dismissing the action in its entirety.

ARGUMENT

I. Introduction

We respectfully submit that the District Court prejudicially went astray in several respects. First, it misconceived or misconstrued District of Columbia case law on

the question of the ability of contracting parties to affect the running of the Statute of Limitations by agreeing that a demand is prerequisite to a right of action on the contract. Secondly, the District Court's interpretations of tax and contract law were demonstrably erroneous. In any event, it erred grievously in raising for the first time on summary judgment the question of illegality and lack of consideration, then proceeding, in boot-strap and post-trial-type fashion, to resolve those questions without any record support and without first apprising counsel and affording them an opportunity for a trial of contested issues or even to submit opposing briefing material. The court's misconceived notions about this agreement poisoned the entire well of this case and precluded a proper resolution even of the Statute of Limitations point, as is manifest from a reading of the transcript. Nevertheless, we will begin our detailed argument with the Statute of Limitations point because, in these circumstances, it was the *only* point that the court should have reached in its ruling.

II. The District Court Erred in Holding That Under District of Columbia Law Contracting Parties May Not Effectively Agree That a Demand Is Prerequisite to Right of Action on the Contract

Here, just before the court below, there is no dispute as to the terms of the agreement by which TMC agreed to deliver this stock to Nyhus; nor is there any dispute as to the applicability of the District of Columbia's three-year Statute of Limitations (D.C. Code § 12-301(7)). What is up for decision is whether the District Court, in determining when the cause of action accrued, was correct in apparently concluding that unless this arrangement was a bailment the action accrued when the agreement was executed (Tr. at p. 2)—in other words that the operation of the Statute of Limitations is inexorable and the parties *could not* effectively agree that a demand for delivery of the property by Nyhus was necessary to put TMC in default of its obligation.

Various rules on the subject of when a cause of action accrues apply to different transactions. For example, the universal rule in a bailment for an indefinite term is that the Statute of Limitations begins to run on the bailor's action to recover the property when there has been a demand and refusal to deliver, but not until then. Annotation: 57 A.L.R. 2d 1047, § 3[a]; D.C.C.E. § 12-301, ¶ 120. As a general proposition a right of action upon a contract does not accrue until the contract has been carried out or until the contingency which forms a part thereof has occurred. *Wahl* v. *Cunningham,* 320 Mo. 57, 6 S.W. 2d 576 (1928). On the other hand, actions on instruments payable on demand generally are said to accrue on the date of their execution and not from the time of demand; and this particular principle has been expressly established by statute in the District of Columbia. Uniform Commercial Code, § 28: 3-122. Notwithstanding these principles, however, the courts have uniformly recognized that in all cases—bailments, instruments, contracts and the like—the parties may agree that demand for performance is a prerequisite to an action for non-performance. *Blick* v. *Cockins,* 131 Md. 625, 102 A. 1022 (1917); cf., Uniform Commercial Code, § 28: 1-102(3). And this Court is no exception. *Schupp* v. *Taendler,* 81 U.S. App. D.C. 59, 154 F. 2d 849 (1946).

This brings us to the two cases upon which we relied below for the proposition that the parties may provide that a right of action upon a contract such as that now before the Court shall accrue when the contingency that forms a part of that contract has occurred. Elementary analysis demonstrates that if a demand for performance of the terms of the agreement is required to recover the property, the statute does not begin to run until there has been a demand and refusal because at that time, and not until then, the breach occurs. We believe that *Schupp* v. *Taendler,* 81 U.S. App. D.C. 59, 154 F. 2d 849 (1946), is a decision that acknowledges this principle and is dispositive of

the issue now before the Court. That case involved two very simple transactions: first, Schupp entrusted Taendler with articles of personalty to be held until he, Schupp, should demand their return; secondly he loaned Taendler a sum of money to be repaid "on demand". As regards the items of personal property this Court of course held that there was a bailment and that the statute began to run on demand and refusal. But with respect to the money it found that the loan became payable at once *unless* there were circumstances indicating that the parties had agreed otherwise.[4] On that point it observed that "Unquestionably, we think the parties might have so framed their contract as to make a demand prerequisite to a right of action." 154 F. 2d at 850. This principle was reaffirmed and applied by this Court in *Irvine* v. *Gradoville*, 95 U.S. App. D.C. 263, 221 F. 2d 544 (1955).[5]

We would particularly call the Court's attention to one other case—*Bannitz* v. *Hardware Mut. Casualty Co.*, 219 Minn. 235, 17 N.W. 2d 372 (1945)—a decision of the Minne-

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[4] *Blick* v. *Cockins*, 131 Md. 625, 102 A. 1022 (1917) is an excellent example of such circumstances.

> "While the general rule is that a promissory note payable on demand is due immediately upon delivery, yet this rule does not apply when a different intention of the parties is apparent from the terms of the instrument *or the purpose and circumstances of the transaction.* * * * In the case before us the terms of the note, which was given for a loan, are wholly inconsistent with the theory that it was intended to become due and payable from the time of its delivery. It provides for the contingency of its maturity occurring at some future period as a result of the maker's failure to furnish additional securities when desired by the payee." 102 A. at 1024 (emphasis added).

[5] The facts there were that Irvine delivered to Gradoville sums of money to be held until he needed it; he apparently intended to move to Washington and expected to call for the money then. When Irvine finally made demand it was refused and he brought suit. Gradoville relied entirely upon the Statute of Limitations and one issue confronting the Court was when the statute began to run. Holding that the transaction was in the nature of a gratuitous bailment the Court observed that the "statute of limitations did not begin to run until there was a demand and a refusal or some other act inconsistent with the bailment." 221 F. 2d at 545 (footnote omitted).

sota Supreme Court relied upon in *Schupp,* because it is on all fours with our case in every essential respect. The plaintiff was an insurance salesman and according to the contract of employment he was to receive a salary, commission and car allowance. Out of his 20 percent commission the defendant deducted plaintiff's salary and car allowance and the balance was carried on the books until demanded or until the contract was terminated. Defendant contended that plaintiff should have demanded the commissions within the period of the Statute of Limitations; plaintiff argued that from the terms of the contract the parties contemplated delay in making demand to some indefinite time in the future. On review of a decision of the lower court sustaining a demurrer, the court, taking plaintiff's allegations at face value, held the action accrued upon plaintiff's demand.

> "Where it appears from a contract that it is the intention of the parties that the money or claim which is the subject matter thereof is to be paid upon a demand in fact, the statute of limitations does not begin to run until an actual demand for payment is made." 17 N.W. 2d at 373.

In the court below TMC principally relied upon this Court's decisions in *Kenyon* v. *Youngman,* 59 U.S. App. D.C. 300, 40 F. 2d 812 (1930) and *McCurley* v. *National Savings & Trust Co.,* 49 U.S. App. D.C. 10, 258 Fed. 154 (1919), and we anticipate its doing so here. We wish to say simply that we have no quarrel with either of those decisions. They are just not our case. *Kenyon,* for example, holds only that absent a contrary intention of the parties a note payable on demand is a present debt upon which an action accrues immediately. In sharp contrast to what the Court found to be the facts in *Kenyon,* please consider the circumstances of the agreement between Nyhus and TMC.

1. The stock was unregistered and restricted and hence not readily marketable (Nyhus dep. at pp. 5, 7).

2. Nyhus was then unable to meet what he conceived to be the possible tax obligations on such a payment and this was made known to TMC (Nyhus dep. at p. 7).

3. He took what he considered to be the necessary steps to defer payment of the stock until he was in position "to meet the corollary cash demands that would proceed from such receipt of a payment" and understood that Mr. Kingman had so agreed on behalf of TMC (Nyhus dep. at pp. 9-10, 16).

4. And both parties understood that this could mean a period of weeks or months or years—that it was quite indefinite—and that the duration of the temporary period was simply until Nyhus should make a follow-up request (Nyhus dep. at pp. 15-16).

We have made all of the above showings not merely by allegations in the Complaint, but by supporting deposition testimony. TMC has offered *nothing but a legal argument* in reply. Our showings must, therefore, serve as the factual basis for determination here. *Shafer* v. *Reo Motors, Inc.*, 205 F. 2d 685 (3rd Cir. 1953).

III. The District Court Erroneously Barred Nyhus from His Day in Court by Precipitously and Unilaterally Raising and Mistakenly Deciding on Motion for Summary Judgment Issues of Illegality and Lack of Consideration

A. The "Surprise" Issue

The District Court's "surprise package" at oral argument, conclusively determining that Nyhus was guilty of income tax evasion, absent the slightest prior hint of interest in this issue, could not be justified under any circumstances. The raising, on summary judgment, of a new and wholly unanticipated defense, without affording any opportunity to adduce additional facts by way of affidavit or deposition or to prepare a legal analysis for argument, denies due process and subverts the right to trial by jury; yet that is precisely what the court below did in applying an unprecedented, "no holds barred—anything goes" version of summary judgment. It need hardly be said that

"summary judgment proceedings under the Federal Rules of Civil Procedure must be conducted under those rules and not under the Marquis of Queensbury rules." *Krieger* v. *Ownership Corporation,* 270 F. 2d 265, 273 (3rd Cir. 1959).

One would be hard put to imagine a more flagrant disregard of the principles embodied in the many decisions prohibiting the use of summary procedures to deny the Constitutional guarantees of due process and of a jury trial or a more complete denial of the fundamental notice and discovery protections provided in the Federal Rules of Civil Procedure. That the issues of illegality and lack of consideration were raised by the court *sua sponte* stands unquestioned. Neither defense had been made a basis for TMC's summary judgment motion or even pleaded as required by Rule 8(c) of the Federal Rules. Manifestly, plaintiff (1) had no notice of either defense, (2) had no opportunity to conduct any discovery with respect thereto and (3) had no opportunity to submit responsive affidavits or deposition testimony. That counsel was not told in advance of oral argument or ruling of the court's intion to raise and decide these issues also stands unquestioned; plaintiff was therefore effectively denied the right to prepare for argument on those issues or submit opposing briefing materials in advance of the court's decision.

We do not contend that in a summary judgment proceeding a court may not, in an extreme case and given the appropriate circumstances, grant summary judgment on issues other than those assigned in the motion and possibly even on one that had not been pleaded. Certainly, however, a court cannot, on summary judgment or at any other time, take for granted a state of facts upon which to base its decision. The moving party has the burden of establishing the lack of any triable issue of fact on a record that is suitable for decision of the question involved and a ruling on motion for summary judgment must be made on the record that the parties have actually pre-

sented, not on one potentially possible. *Shafer* v. *Reo Motors,* 205 F. 2d 685 (3rd Cir. 1953).

TMC did not so much as plead the defenses of illegality or lack of consideration, let alone adduce proof to support them. As is manifest upon reading the transcript of the argument, the court made its findings by resolving the disputes as to which TMC's counsel had engaged Nyhus during his deposition. For example, counsel argued in the course of the deposition that Kingman had been "handpicked" by Nyhus (Nyhus dep. at p. 8); Nyhus responded that Kingman was handpicked only in the sense that he interviewed Kingman and recommended that TMC's Board of Directors hire him (Nyhus dep. at pp. 44-45); the court, however, reviewed the deposition and apparently made the factual determination that Kingman was Nyhus' "friend" on the defendant's side (Tr. at p. 5). Another example: TMC's counsel argued during deposition that the agreement was made in order to "defer" or "attempt to defer" taxes, apparently assuming that there is something illegal in that (Nyhus dep. at p. 10); Nyhus testified that both he and Kingman understood the arrangement to be perfectly legitimate (Nyhus dep. at p. 46); notwithstanding this testimony, the court concluded that this was an illegal "tax dodge" to "avoid income tax obligations" (Tr. at p. 5). Yet even TMC and its auditors acknowledged existence of the obligation to deliver the stock, without even mentioning any question of illegality, as is pointed out in the Wigger letter referred to on page 6 of this brief. The above, in and of itself, is such a glaring abuse of the summary judgment rule as to require reversal of the trial court's decision.

B. The Illegality Issue

But the real irony lies in the fact that in proceeding as it did the court was totally in error as a matter of contract law in assuming that a contractual arrangement influenced by tax considerations is somehow illegal. To be sure, a contract to burn receipts and records, as part of a conspiracy to conceal income and thus *evade* taxes, could

be held unenforceable by reason of illegality. But it is quite a different thing to hold that a party's selection of a particular contractual arrangement in an effort to *defer* or *minimize* the payment of taxes renders the whole arrangement illegal and hence unenforceable. If that were so then all deferred compensation agreements and acquisitions of "tax-loss" corporations seeking to minimize taxes would be unenforceable. Yet we know that the rights resulting from a legal transaction otherwise valid are not different, vis-a-vis taxation, because the transaction has been undertaken to escape taxation. *Gregory* v. *Helvering,* 293 U.S. 465, 469 (1935); *Granite Trust Co.* v. *United States,* 238 F. 2d 670 (1st Cir. 1956); *Comm'r of Internal Rev.* v. *National Carbide Corp.,* 167 F. 2d 304 (2d Cir. 1948), aff'd 336 U.S. 422.[6] Self-evidently, these are perfectly lawful contracts, even though motivated by tax considerations; but if the District Court rule is approved by this Court then all contracts whose provisions result in tax deferral or reduction are in jeopardy.

Whether or not this agreement would have been effective as a means of deferring income for tax purposes is an interesting, though unnecessary, question. Its resolution would depend on a careful and exhaustive analysis of the state of the tax law on such questions as deferred compensation agreements, constructive receipt of payments, "realization" of taxable income, ascertainability of value and many more—a task which would require comprehensive discovery and extensive research and briefing. See *e.g., Appeal of Graydon,* 2 B.T.A. 552 (1925). But that question was not really before the court and it erred critically in assuming that there ever was any tax deferral effected by this arrangement between Nyhus and TMC. The District Court apparently accepted the assumption of Nyhus, a layman, that he would have been taxed on the stock in the year in which it was received (Nyhus dep. at pp. 13-14). In point of fact, however, the federal tax

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[6] In *Granite Trust* the Court cogently observed that "Again and again the courts have pointed out that a 'purpose to minimize or avoid taxation is not an illicit motive.'" 238 F. 2d at 675.

regulations specifically provide that where, as here, stock is paid to an employee as compensation for services, but the stock is subject to restrictions which materially affect its value, the employee does not experience a "taxable event" until the restrictions are removed or until he sells the stock, whichever occurs first. Treas. Reg. § 1.61-2 (d)(5), T.D. 6416, 1959-2 Cum. Bull. 131.[7] See also, 4 Loss, Securities Regulation, 2d Ed. 2648 (1959). Restraints upon alienation are classic examples of restrictions which materially affect the value of the stock and many courts have so held. See, *e.g.*, *Helvering* v. *Tex-Penn Oil Co.*, 300 U.S. 481 (1937).[8] Thus, the arrangement for deferring physical delivery of the certificates representing the restricted shares was totally unnecessary because Nyhus was entitled to a tax deferral in any event.[9]

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[7] This particular regulation provides that the rules of paragraph (d)(2) of § 1.421-6 shall be applied to property transferred by an employer to an employee, as compensation for services, that is subject to restrictions which have a significant effect on its value. Treas. Reg. § 1.421-6(d)(2) provides in pertinent part as follows:

> "* * * the employee realizes compensation at the time such restriction lapses or at the time the property is sold or exchanged, in an arm's length transaction, whichever occurs earlier * * *"

[8] See also, *McDonald* v. *Comm'r of Internal Rev.*, 230 F. 2d 534 (7th Cir. 1956); Fleischer & Meyer, "Tax Treatment of Securities Compensation: Problems of Underwriters," 16 Tax L. Rev. 119, 131-141 (1960-61). Fleischer and Meyer have observed that while stock subject to such restrictions may have a value it is often impossible to determine what that value is. "Thus, the courts have deferred taxation when restricted stock is received not only because there could be no willing buyers and sellers, but also because the value of any stock received was unascertainable." *Id.* at 134 (footnote omitted). They acknowledge that the Internal Revenue Commissioner has taken this approach in adopting the regulations referred to in the text and in footnote 7, *supra*. Treas. Reg. § 1.421-6(d)(2) also provides the means of ascertaining the value of such stock for tax purposes.

[9] As a further point, we note that even where a showing of the elements of contractual illegality has been made, but it has little or no relationship to the object of the lawsuit, courts have been loath to deny enforcement of the contract if one party will thereby reap a substantial windfall at the expense of the other party. *Kelly* v. *Kosuga*, 358 U.S. 429 (1959); *Bruce's Juices, Inc.* v. *American Can Co.*, 330 U.S. 743 (1947). See the related consideration point at pages 17 and 18 of this brief.

The significance of this point is twofold. First, it utterly destroys the legal basis on which the District Court proceeded—the assumption that Nyhus would have had to pay taxes on the stock for 1964 had he received it in that year. Second, it illustrates with startling clarity the peremptory and prejudicial manner in which the District Court disposed of Nyhus' arguments and deprived him of his fundamental rights. Not only was the District Court procedurally out of order in suddenly injecting the tax issue without affording any opportunity to respond, but it was also entirely wrong in ruling on the tax point fundamental to the position which it had itself raised.

C. The Consideration Issue

The District Court's disposition of the consideration issue has much in common with the illegality issue: both were raised *sua sponte,* without a suggestion of prior warning and both were decided on the basis of erroneous legal principles and interpretations.

The transcript of the oral argument makes it clear that the District Court insisted that TMC's May 1964 agreement to deliver the stock on demand was not supported by any consideration. The situation, however, was one in which Nyhus had virtually completed his contractual obligations, but TMC was still obliged to him. Nyhus asked TMC to adjust the time for its performance of its obligation to him, and TMC agreed. If this Court now holds that such an alteration in the timing of the promisor's performance must be supported by fresh and separate consideration, the consequences can only be disastrous. The laborer who asks his employer to hold his check and then pay him two days after payday will be unable to collect from the employer unless he can demonstrate the existence of fresh and separate consideration. The soft-hearted grocer who gives his customer an extra week to pay his bill will also find himself out of luck. The imaginary horribles are too horrible to imagine.

An interesting question would be presented if Nyhus had specified in May 1964 that he would not take the stock until May 1965. Could this forebearance have been enforced against him by TMC? A substantial body of law seems to hold that this would be a "modification" of an existing contract and hence Nyhus' undertaking to forebear could be enforced against him, with no need of separate or additional consideration. *Mid-Century, Ltd.* v. *United Cigar-Whelan St. Corp.*, 109 F. Supp. 433 (D.C. 1953); *Littell* v. *Udall*, 242 F. Supp. 635 (D.C. 1965), rev'd on other grounds, 366 F. 2d 668. We can only say that if without new consideration, Nyhus, the obligee, would have been bound to forebear from collection, then, *a fortiori*, TMC, the obligor, should certainly have been bound to perform.

CONCLUSION

We respectfully request that the decision of the District Court be reversed insofar as it held: (1) that the action is barred by the Statute of Limitations; (2) that the agreement between Nyhus and TMC was illegal and therefore unenforceable; and (3) that their agreement is unenforceable for want of consideration. And we also request such other and further relief as the Court deems proper.

Respectfully submitted,

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1730 Rhode Island Avenue, N.W.
Washington, D. C. 20036
Counsel for Appellant

Dated: August 19, 1969

APPENDIX

March 17, 1965

PERSONAL

Mr. D. B. Barrows
Airlines Ticket Agency Inc.
1519 Walnut Street
Philadelphia, Pennsylvania

Dear Dan:

Nyhus said you told him the way was clear to issue the 838 shares of stock that TMC has been withholding. If this is so, you must have Vandervoort write an appropriate letter to Riggs Bank here in Washington to issue it.

As you know, Nyhus only accepted the cash portion of his salary for the period 12/1/63-5/31/64 as he didn't want to pay the tax on the stock portion. Arthur Andersen asked him to sign a waiver of rights to the stock, but at that time, he said he wanted it eventually. Therefore, AA & Co. accrued it as of 11/30/64 in the amount of $6,250.00. Under his contract, this would amount to 2,148 shares valued at $2.91 a share. However, as such stock was not paid within two and one half months after our fiscal year-end TMC would be denied a tax deduction for the $6,250.00 in 1964 and could not carry it forward as an offset against income in future years. As a result, when we issue the stock, I think we would be justified in deducting 48% of 6,250 or $3,000.00. Forty-eight per cent will be the corporate tax rate in effect in 1965 and after.

TCI's after tax profit for 1964 was about $37,000 of which $24,600 will have to be paid to TMC for stock under the agreement. This will bring TCI's investment in TMC to approximately $45,600 or 22,800 shares.

Sincerely,

TRAVEL MANAGEMENT CORP.
RALPH L. WIGGER
Asst. to the Treasurer

5-5

RJK
5.22

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,264

N. SIDNEY NYHUS,

Appellant

v.

TRAVEL MANAGEMENT CORPORATION,

Appellee

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

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TABLE OF CONTENTS

TABLE OF CITATIONS

Cases:

* Cases and statutes chiefly relied upon are marked by asterisks.

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23,264

N. SIDNEY NYHUS,

Appellant

v.

TRAVEL MANAGEMENT CORPORATION,

Appellee

On Appeal from the United States District Court
for the District of Columbia

BRIEF FOR APPELLEE

STATEMENT OF ISSUES PRESENTED

This suit by defendant's former employee seeks damages for defendant's failure to deliver 3,125 shares of its stock under a written employment agreement. The agreement was terminated May 31, 1964 and (for purposes of defendant's motion for summary judgment only) defendant concedes that the shares were due and owing on that date. No request for issuance of the stock was made until January 1968 and no suit was brought until January 30, 1969.

The questions presented are whether the suit was barred by the Statute of Limitations and whether the court properly granted defendant's motion for summary judgment, where:

> (a) the only basis asserted for extending the three-year Statute of Limitations was that in May 1964, at plaintiff's request, defendant orally consented to postpone issuing the stock indefinitely until plaintiff felt in better financial position to meet his income taxes thereon,
>
> (b) such oral understanding was not reduced to a signed writing to satisfy the Statute of Frauds (D.C. Code § 28-3504),
>
> (c) defendant's consent to postpone delivery was not supported by fresh consideration, but was simply a favor or accommodation,
>
> (d) no certificate of stock existed to constitute the subject of a bailment.

This case has not previously been before this Court.

STATEMENT OF THE CASE

This is an action by N. Sidney Nyhus (Nyhus) against Travel Management Corp. (TMC) seeking damages for non-delivery of TMC stock under an employment agreement.

TMC moved for summary judgment dismissing the complaint on the ground that the action was barred by the three-year Statute of Limitations (D.C. Code § 12-301(7)).

For purposes of the motion, the facts are undisputed. Plaintiff has never contended there is any genuine issue of material fact that requires litigation. On the contrary, Plaintiff's Statement under

Local Rule 9(h) states the facts substantially as they are set forth in Defendant's Statement under the Rule.[1]

This action is based on a written Employment Agreement, dated August 7, 1962, a copy of which is attached to the complaint. Plaintiff's salary thereunder was payable partly in cash and partly in shares of defendant's stock (Employment Agreement, par. 4).

The Employment Agreement was terminated May 31, 1964 (Complaint, par. 3; Defendant's Statement under Local Rule 9(h)).

Plaintiff claims and defendant concedes (for purposes of its motion only) that 3,125 shares of TMC stock were due and owing to plaintiff on that date, May 31, 1964 (Complaint, par. 3; Defendant's Statement under Local Rule 9(h)).

In May 1964, at Nyhus' request, TMC consented to postpone issuance of the stock indefinitely until Nyhus felt in better financial position to meet his income taxes thereon (Complaint, par. 3; Nyhus dep., pp. 7-12, 13-16, 30, 46-47, 50-51). This understanding was entirely oral; it was never reduced to writing (Nyhus dep., p. 14). It was not supported by fresh consideration to TMC, but was simply a favor, an "accommodation" to Nyhus (Nyhus dep., p. 30).

[1] Local Rule 9(h) of the District Court provides in pertinent part:

> "Any party opposing the motion [for summary judgment], may, not later than three days prior to the hearing, serve and file a concise 'statement of genuine issues' setting forth all material facts as to which it is contended there exists a genuine issue necessary to be litigated.
>
> In determining any motion for summary judgment, the Court may assume that the facts as claimed by the moving party are admitted to exist without controversy except as and to the extent that such facts are asserted to be actually in good faith controverted in a statement filed in opposition to the motion."

No stock certificate existed that could constitute the subject of a bailment; at no time did TMC prepare or execute a certificate for the shares claimed by Nyhus (Supplemental Memorandum and Affidavit of Peter Vandervoort in Support of Defendant's Motion).

Nyhus made no request for issuance of the shares until January 1968, more than three years after they were due in May 1964 and, similarly, more than three years after the oral understanding of May 1964 (Complaint, par. 4; Nyhus dep., pp. 28, 52-53).

This suit was not instituted until January 30, 1969, far more than three years after the shares were due in May 1964 and, similarly, far more than three years after the oral understanding of May 1964.

Plaintiff concedes that the applicable Statute of Limitations is three years as provided in D.C. Code § 12-301(7) (Appellant's Brief, p. 8). The only question is whether the oral understanding of May 1964, assuming it to have been as pleaded by plaintiff and described in his own deposition, had the effect of extending the limitations period beyond May 31, 1967.

ARGUMENT

I.

THE ORAL UNDERSTANDING OF MAY 1964 DID NOT SATISFY THE STATUTE OF FRAUDS.

D.C. Code § 28-3504, a provision of the Statute of Frauds, provides in pertinent part:

> "In an action upon a simple contract, an acknowledgment or promise by words only is not sufficient evidence of a new or continuing contract whereby to take the case out of the operation of the statute of limitations or to deprive a party of the benefit thereof unless the acknowledgment or promise is in writing, signed by the party chargeable thereby . . . ."

TMC has relied from the outset on this statutory provision (Memorandum in Support of Defendant's Motion, p. 2).

In a contract action such as this, the Statute renders an oral acknowledgment or promise insufficient to take the case out of the operation of the Statute of Limitations. In order to take a case out of the Statute of Limitations the acknowledgment or promise must be clear and unqualified, must be intended for receipt by the obligee, and must be reduced to writing signed by the party sought to be charged. *City of Fort Scott v. Hickman*, 112 U.S. 150, 5 S.Ct. 56, 28 L.Ed. 636 (1884); *Shepherd v. Thompson*, 122 U.S. 231, 7 S.Ct. 1229, 30 L.Ed. 1156 (1887); *Moore v. Snider*, 71 U.S. App. D.C. 293, 109 F.2d 840 (1940) cert. den. 309 U.S. 685, 60 S.Ct. 808, 84 L.Ed. 1029 (1940); 34 Am. Jur., Limitation of Actions, §§ 299, 302, 309, 319.

It certainly looks that way!

As noted above, the oral understanding of May 1964 was never reduced to writing (Nyhus dep., p. 14).

Nyhus' statement under Local Rule 9(h), although filed more than a week after TMC's memorandum citing the Statute of Frauds, made no claim that there was any signed writing to satisfy the Statute; nor did it claim there is any genuine issue on this matter that needs to be litigated (Plaintiff's Statement under Local Rule 9(h)).

Appellant's brief likewise makes no contention that there was any signed writing that would satisfy the Statute of Frauds. Indeed, it makes no reference whatever to the Statute of Frauds and makes no attempt to meet its obvious impact on this case.

A. TMC's Oral Consent To Defer Issuing the Stock Was Not Supported by Fresh Consideration That Would Have Rendered the Statute of Frauds Inapplicable.

If the oral understanding of May 1964 had involved a new promise by TMC supported by fresh consideration, the Statute of

Frauds would not have applied. *Cafritz v. Koslow*, 83 U.S. App. D.C. 212, 167 F.2d 749 (1948).

But this was not the case. TMC's oral consent to postpone issuing the stock until Nyhus felt he could conveniently pay his income tax thereon was without any consideration whatever; as Nyhus acknowledged, it was simply an "accommodation" (Nyhus dep., p. 30).

Nyhus' statement under Local Rule 9(h) made no claim that there was consideration for TMC's consent to defer delivery; nor did it claim there is any genuine issue to be litigated on the matter of consideration (Plaintiff's Statement under Local Rule 9(h)).

Appellant's brief likewise makes no contention that there was fresh consideration for TMC's oral consent to delay issuing the stock.[2] Nor is there any support in the record for such a contention. Appellant argues that no consideration was necessary (Appellant's Brief, pp. 17-18). In this connection, he relies chiefly on *Mid-Century, Ltd. v. United Cigar-Whelan St. Corp.*, 109 F. Supp. 433 (D.C., 1953), a decision of Judge Holtzoff that a written modification of a long-term lease needed no fresh consideration. That case did not involve the question at bar: whether, under the Statute of Frauds, an oral understanding without fresh consideration can extend the Statute of Limitations. *Cafritz, supra*, holds it cannot.

Since it is undisputed that the three-year Statute of Limitations is applicable and since there was no consideration for TMC's oral consent to defer issuing the stock, the Statute of Frauds alone was ample grounds for granting summary judgment dismissing the complaint.

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[2]Since there was no fresh consideration, the matter of illegality of consideration, mentioned by Judge Gesell as still an additional ground for decision, need not be reached on this appeal.

II.
EVEN APART FROM THE STATUTE OF FRAUDS, NYHUS' CLAIM WAS BARRED AFTER MAY 31, 1967.

TMC's oral consent in May 1964 to defer issuing the stock was at most an understanding that the shares would be issued whenever Nyhus might request them. It is well settled in this jurisdiction that in the case of such a demand obligation, no actual demand is prerequisite to the accrual of a cause of action. The cause accrues at once when the obligation is payable. *McCurley v. National Savings & Trust Co.*, 49 U.S. App. D.C. 10, 258 Fed. 154 (1919); *Schupp v. Taendler*, 81 U.S. App. D.C. 59, 154 F.2d 849 (1946); *Kenyon v. Youngman*, 59 U.S. App. D.C. 300, 40 F.2d 812 (1930).

McCurley, supra, is directly in point. There, plaintiff sued the estate of her employer for $16,297.84 owed for her services as a housekeeper. The amount claimed represented salary of $125 per month for services over a fifteen year period. The record showed that "after money for her services became due to Mrs. McCurley, she permitted it to remain in the hands of Mr. Bellows [her employer]." *Id.* at 15. This Court held that claims for amounts which became due and owing more than three years prior to commencement of suit were barred by the Statute of Limitations.

In *Schupp, supra*, the plaintiff delivered money to the defendant as a loan payable on demand. Suit was commenced more than three years later. As to this transaction, the Court held the money was due at once and the claim was barred by limitations. The plaintiff had also delivered articles of personalty for safekeeping by defendant. The Court held this transaction was a bailment and that plaintiff's cause of action did not accrue until the bailee refused a demand for the return of the property. This rule applicable to bailments is of course well settled. But in the case at bar there was no bailment; no stock existed which could constitute the subject of a bailment (Supplemental Memorandum and Affidavit of Peter Vandervoort in

Support of Defendant's Motion). This action is one on simple contract.

Appellant argues that parties may stipulate that an actual demand is to be prerequisite to the right of obtaining performance (Appellant's Brief, pp. 9-11). But appellant cites nothing in the record to show any such stipulation in the case at bar. Nyhus testified to the terms of the oral understanding (Nyhus dep., pp. 7-12, 13-16, 30, 46-47, 50-51); and he affirmed that his testimony "fully disclosed the substance" thereof (Nyhus dep., p. 30). Nothing in his testimony indicated that his entitlement to the stock was to be conditioned on his making a demand. On the contrary, his testimony, like his complaint and like the statements of both parties under Local Rule 9(h), unequivocally stated that the shares were due and owing to him at the termination of his employment on May 31, 1964 (Nyhus dep., p. 12; Complaint, par. 3; Defendant's Statement under Local Rule 9(h); Plaintiff's Statement under Local Rule 9(h)).

Thus, the three-year period of limitations expired May 31, 1967 and Nyhus' claim was thereafter barred. The cases chiefly relied on by appellant contain nothing to shake this conclusion. Appellant relies on *Schupp, supra, Irvine v. Gradoville*, 95 U.S.App.D.C. 263, 221 F.2d 544 (1955) and *Bannitz v. Hardware Mut. Casualty Co.*, 219 Minn. 235, 17 N.W. 2d 372 (1945).

In *Schupp, supra,* this Court stated that the parties "might have framed their contract as to make a demand prerequisite to a right of action", but held that nothing in the record indicated such a stipulation. This Court expressly held the mere fact that parties contemplated a request or demand for performance does not postpone the right of action or the running of the period of limitations:

> ". . . no stipulation or agreement as to repayment was made, except that the loan should be paid on demand. In the circumstances, the sum loaned became due at once and the statutory period of limitations precludes the claim." (*Id.* at p. 60).

In *Irvine, supra,* this Court held the delivery of funds for safe-keeping was a bailment and applied the rule applicable to bailments described above.

In *Bannitz, supra,* the defendant *conceded* the parties had stipulated that a demand was to be a prerequisite to plaintiff's cause of action. The Minnesota Court stated at p. 373:

> "Defendant's position is that, even though the balance of commissions *was not to be paid until after plaintiff's demand*, the demand should have been made within a reasonable time. . ." (Emphasis supplied.)

Thus, *Bannitz* and *Irvine* are not in point; and *Schupp* is cogent authority in support of the judgment below.

In summary, the oral understanding of May 1964 did not satisfy the Statute of Frauds. Moreover, under this Court's rule in *McCurley* and *Schupp, supra,* even apart from the Statute of Frauds, Nyhus' claim was barred by the three-year Statute of Limitations after May 31, 1967.

If this Court were to lower the bar of the Statute of Limitations and the related Statute of Frauds, as urged by appellant, the policy of both statutes against entertaining stale claims would be seriously impaired.

CONCLUSION

The order and judgment below should be affirmed.

Respectfully submitted,

/s/ Lucien Hilmer
/s/ Robert R. Elliott
/s/ Richard F. Kessler
Attorneys for Appellee

Of Counsel:

Surrey, Karasik, Greene and Hill

REPLY BRIEF FOR APPELLANT

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 23264

N. SIDNEY NYHUS, *Appellant*

v.

TRAVEL MANAGEMENT CORPORATION, *Appellee*

On Appeal From the United States District Court for the District of Columbia

WORTH ROWLEY
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Dated: October 3, 1969

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TABLE OF CONTENTS

TABLE OF CITATIONS

CASES:

AUTHORITIES CITED:

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TRAVEL MANAGEMENT CORPORATION, *Appellee*

On Appeal From the United States District Court for the District of Columbia

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REPLY BRIEF FOR APPELLANT

INTRODUCTION

We note with satisfaction, though with little surprise,[1] that TMC practically abandons the illegality issue (Appellee's Br. p. 6, note 2). Since the illegality issue was so obviously at the heart of the District Court's decision, we could, perhaps, stop here. Out of an abundance of caution, however, we ask the Court to indulge us in our briefly treating with two matters in Appellee's brief. One concerns the issue of "consideration" which we discussed in our first brief (pp. 17-18); the other concerns the Statute of Frauds which, quite aside from its clear inapplicability here, comes as quite a surprise.

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1 See Appellant's Principal Br., pp. 12-17.

I. The Consideration Issue

There is an illusory quality to TMC's argument that there was no consideration for its promise to hold the stock owed Nyhus until he demanded it at a later date. Perhaps this explains why we find no mention of this issue either in TMC's Answer to the Complaint or in its Motion for Summary Judgment.

The heart of the matter is Nyhus' entitlement to the stock, and the consideration for this was the service which he performed under the employment contract. Incidental to the stock entitlement, to which the consideration also flowed, was the timing of the delivery of the stock, which by a later mutual agreement was changed from the time of the expiration of the contract to some time thereafter when Nyhus made a specific demand for the stock. We believe that realistically and sensibly the consideration involved in Nyhus' services extended to the entire transaction, including the modification of delivery time. But if for the sake of scholasticism consideration must be shown for the modification of the delivery date, then we say that such consideration can be found in Nyhus' desisting from his right to obtain the stock at the time of the expiration of the contract and promising that he would not hold TMC in default until he made a later specific demand.[2] In this connection, we would call the Court's attention to *Irvine* v. *Gradoville,* and *Bannitz* v. *Hardware Mut. Casualty Co.,* which are discussed on pages 10 and

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[2] Section 75 of the Restatement of Contracts (1932 Ed.) supports this view.

§ 75 Definition of Consideration:

(1) Consideration for a promise is

(a) an act other than a promise, or

(b) a forebearance, or

(c) the creation, modification or destruction of a legal relation, or

(d) a return promise.

(2) * * *.

11 of our principal brief. It will be noted that there is not the slightest hint in these cases of a requirement of "fresh" consideration for the essentially same situation we have here.

We have also cited, on page 18 of our principal brief, two cases in this jurisdiction for the proposition that no "fresh" consideration is needed for a modification of an existing agreement—*Mid-Century* and *Littell.* TMC entirely ignores the *Littell* case, but attempts to distinguish *Mid-Century* on the ground that it involved a *written* modification. But a reading of that decision does not provide the slightest basis for such a distinction. The element of consideration is not all affected by the question of whether an agreement is oral or written, and that a written agreement may be modified by parol is well settled. *Nickel* v. *Scott,* 59 A. 2d 206, 207 (D.C. 1948).

II. The Statute of Frauds Issue

The Statute of Frauds argument leaves us baffled (Appellee's Br., pp. 4-5). The Complaint in this case is grounded on TMC's promise to withhold issuing the stock until Nyhus was financially able to meet taxes thereon and make a demand for delivery. Yet, one looks in vain for any semblance of a Statute of Frauds defense in TMC's Answer to the Complaint. Furthermore, there is no indication that the Statute of Frauds defense in any way entered into the decision of the District Court. Indeed, it would have been strange if the District Court had supplied a defense of such a clearly affirmative pleading nature.

But aside from all this, it must be apparent that D. C. Code § 28-3504 is not applicable here. This type of statute is in existence in most jurisdictions and its application has been confined to situations where a cause of action on an obligation had accrued, or had even been barred by the Statute of Limitations. The statute requires that a

renewal or revival of such an obligation must be in writing.[3] But this is not at all our case. The modification of the employment agreement here in question was made *before* any rights to the stock had accrued to Nyhus. There was at no time any suggestion of "reviving", or "renewing" any obligation, because at no time did TMC deny its obligation, or its ability and willingness, to deliver the stock on the expiration of the contract. What was involved here was simply and purely a mutual modification of the stock delivery date stipulated in the original employment agreement before the rights to such stock had accrued. None of TMC's citations involve a situation such as here, but rather the typical run of an "acknowledgment" after the cause of action had accrued or the Statute of Limitations had run.

CONCLUSION

We believe that the third and last matter argued by TMC (Appellee's Br., pp. 7-9) is adequately covered in our principal brief and we should not burden the Court with additional argument. Our prayer for relief remains as stated in our principal brief.

Respectfully submitted,

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Counsel for Appellant

Dated: October 3, 1969

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[3] 34 Am. Jur., Limitation of Actions, § 289.